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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 185

AUGUSTINE BALDONADO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR PETITIONER

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The Opinion Below

The Opinion of the California Supreme Court is reported at 53 Cal. 2d 824, 3 Cal. Rptr. 363, 350 P. 2d 115 (R. 205).

Jurisdiction

The Opinion of the California Supreme Court was entered on March 11, 1960 (R. 205). The petition for writ of certiorari was filed on June 7, 1960, and was granted on June 27, 1960 (R. 208; 363 U.S. 840).

Question Presented

Was petitioner's right to the trial guaranteed by the Due Process Clause of the XIV Amendment violated in view of the conduct of the District Attorney, the resulting publicity, and the other circumstances under which the trial was held?[1]

Statutes Involved

The Constitution of the United States provides in pertinent part as follows:

Amendment XIV, Section 1:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . . "

Section 190, Penal Code of the State of California, in part provides:

> "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court or jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1, . . . "

Section 190.1, Penal Code of the State of California, in part provides:

> "The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life, shall first be determined, without a finding as to penalty. If such

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[1] *Baldonado* v. *California*, 363 U.S. 840 (1960); R. 208. The second question certified for review does not involve this petitioner.

person has been found guilty of an offense punishable by life imprisonment or death and has been found sane on any plea of not guilty by reason of insanity there shall thereupon be further proceedings on the issue of penalty and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant. . .

" . . . If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. . . . "

Section 1033, Penal Code of the State of California, in part provides:

"A criminal action pending in a superior court may be removed from the court in which it is pending on application of the defendant, on the ground that a fair and impartial trial cannot be had in the county. . . . "

Section 1239(b), Penal Code of the State of California, provides:

"(b) When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel."

Statement of the Case

In the middle of December of 1958, Petitioner; Luis Moya and Elizabeth Duncan were arrested in connection with the disappearance of Olga Duncan, and were subsequently indicted for her murder (R. 2).

The bizarre context in which these events occurred caused widespread newspaper publicity and excited enormous public interest (R. 40). The distillation of the newspaper accounts at the time of these arrests created these impressions and suspicions: Mrs. Duncan was deeply attached to her son, Frank Duncan, and had opposed her son's marriage on June 20, 1958 to Olga. On August 7, 1958, unknown to her son, she secured a fraudulent annulment of the marriage by impersonating Olga, and she agreed to pay Baldonado and Moya $6,000 to kill Olga.

Superimposed on this account were certain extraordinary statements of the District Attorney. On December 22, 1958, he issued a statement advocating the death penalty for petitioner and the others which was published on the front page of the community's leading newspaper under the heading "D.A. Urges Death Term in Killings" as follows:

> "The brutal, calculated, revolting killing for hire of Olga Duncan is one of a number of horrible crimes which have recently been committed in California. I simply cannot understand how some of our leaders, in the face of these events, can seriously contend that the death penalty is not appropriate punishment for the perpetrators of such a crime.
>
> "Many persons contend that the death penalty does not deter murder. Frankly, I am sick of this illogical argument. Of course penalties do not completely deter crimes. Jail sentences do not completely deter drunken

drivers, burglars, robbers or any other criminals and death penalties do not completely deter murderers. But that is no reason to dispense with penalties.

"Retaliation is a basic instinct of the human race. In civilized societies, the government takes over from the individual the job of retaliating against a wrongdoer. From biblical times, a life for a life has been recognized as just and fair.

"The alternative in California, a life sentence which permits a prisoner to be paroled in seven years, simply is insufficient retaliation. I hope the people of this state rise up against the propaganda drive[1] that has flooded us lately about the so-called evils of capital punishment. They must demand that California retain the death penalty to deal with situations such as the Duncan case" (R. 9; Appendix A).

In an affidavit opposing a change of venue the District Attorney purported to justify this statement by the following logic:

"My statement that the death penalty is appropriate for the perpetrators of the murder of Olga Duncan cannot prejudice the defendants. The law of California is such that the defendants are guaranteed a fair trial. If, after such a trial, the defendants are found not to have perpetrated the crime, they obviously will not be prejudiced and my statement would be inapplicable to them. If, on the other hand, they are found guilty of first degree murder, then the statement will apply to them. The fact that it was made before the taking of testimony before the trial jury is of no consequence. In any case involving murder where the prosecutor seeks the death penalty, the fact that he will do so is always disclosed before the trial jury is selected by reason of the questions asked of prospective jurors as to the entertainment of such

conscientious opinions as would preclude their finding the defendant guilty and imposing the death penalty. Consequently, whether prospective jurors know that I will seek the death penalty as the appropriate punishment from reading the newspapers or from hearing me say so in court is immaterial" (R. 14-15).

Petitioner was indicted by the Grand Jury of Ventura County on December 26, 1958 (R. 2).

On December 30, 1958 a story appeared in the same newspaper purporting to be an interview with the District Attorney in which he stated why the death penalty was proper punishment for this crime. Among other things the District Attorney said:

> "When you do catch 'em, and when you do convict 'em, what are you going to do with them . . . rehabilitate 'em?"
>
> According to District Attorney Roy A. Gustafson, the chances of rehabilitating the three persons arraigned today on charges of murder-for-hire are "awfully slim . . . and I don't want to take that kind of chance."
>
> That is one of the reasons why he is going to ask for the death penalty against Mrs. Elizabeth Duncan, and her two accused accomplices—Augustine Baldonado and Luis Moya—in the hired slaying of nurse Olga Duncan.
>
> Gustafson repeated his plans yesterday, and added that he expected the case would probably be mentioned when the new legislative campaign opens this year to do away with the death penalty.
>
> "The most pertinent point in the death penalty is retribution. Anyone who says we must get away from the 'barbaric thought' of retribution is not being realistic.

* * * * *

"We deal in a punishment system with retribution. Society takes over for the individual who has been wronged, and it punishes the wrongdoer. Many crimes can't have retribution: rape, for instance. So we incarcerate, or fine or execute."

Retribution, he says, is one of four major points in any punishment. Another is deterrence, a third is rehabilitation. Rehabilitation's statistics are "pretty sad," he says. And any alternative to capital punishment usually involves life sentences without pardon or parole. A lifer without hope of ever leaving prison "has no hope and becomes a vegetable. Or worse, as we'll show you later."

But as far as rehabilitation goes, Moya was paroled a year ago after serving a year out of a 1-to-10-year term for marijuana possession. Gustafson says Moya was using marijuana when he was arrested in the Duncan murder case.

By the state's own figures, 48.8 percent of parolees wound up back in prison or jail within four years of being paroled. In the case of women, the rate was 57.5 percent. And the rate is going up, not down, he points out.

He commented that the possibility of putting California's third woman in the gas chamber does not present him with any qualms.

"This is appropriate punishment," he said, paraphrasing the judge in the Harvey Glatman case. And he adds: "What are you going to do, rehabilitate 'em?" [2]

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[2] See Appendix B, containing the complete newspaper story from which the foregoing was taken. See R. 44-45 and page 6 of Exhibit 8 thereto. In response to the petitioner's citation of this newspaper story in connection with a motion to change venue, the District Attorney made an affidavit denying that he made any statement to the effect that Moya was using marijuana when he was arrested (R. 16). This affidavit made no other denials regarding the substance of the purported interview.

The petitioner filed an application on January 8, 1959 for a change of venue. On January 15, 1959, the motion was denied (R. 6, 22). On February 16, 1959 the Duncan trial commenced (R. 154, Duncan Transcript of Record), and on March 16, 1959, the jury found Mrs. Duncan guilty of murder in the first degree (R. 64). On March 20, 1959 the jury sentenced Mrs. Duncan to death (R. 75).

In the March 21, 1959 issue of the Ventura County Star-Free Press, the District Attorney is reported to have hailed the Duncan death verdict by stating that it should have the effect of heading off moves to abolish the death penalty in California (R. 68, Exh. A-36, Moya).

The heavy press coverage accorded to a sensational murder case in the trial of Mrs. Duncan was intensified by camera coverage of the trial proceedings.

On April 6, 1959, after a plea of guilty to murder in the first degree, a jury was impanelled for the sole purpose of determining the petitioner's punishment, and thereafter the jury fixed his penalty at death (R. 23, 28). On April 14, 1959 an order was made denying a motion for a new trial and the petitioner was sentenced to death (R. 28-29). Thereupon an appeal was undertaken automatically to the California Supreme Court pursuant to California Penal Code Section 1239(b). The judgment of the trial court was affirmed on March 11, 1960.

SUMMARY OF ARGUMENT

Under California law petitioner was entitled to a jury trial, the sole issue of which was to determine his penalty for the crime of first degree murder. Prior to the commencement of this trial, the District Attorney made vigorous and extensive arguments for imposition of the death penalty which were intentionally given to the press and widely disseminated. Such acts of the District Attorney amounted to misconduct and constituted a deliberate effort to interfere with petitioner's penalty hearing. Seeking to correct this wrong, petitioner asked for a change of venue. His request was denied. Due process requires that in this type of situation the state provide a "corrective process".[3]

As a result of the above circumstances petitioner was deprived of his right to a fair trial, and hence the judgment deprives him of life without due process of law, as guaranteed by the XIVth Amendment to the Constitution of the United States; the judgment sentencing him to death ought to be reversed with instructions that the penalty issue be retried in a county in California less susceptible to the District Attorney's prejudicial statements.

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[3] *Frank v. Mangum*, 237 U.S. 309, 335.

ARGUMENT

I

Introduction

> "Henceforth there shall be in every countie a sober, discreet and religious person appointed by the countie court, to be atturney to the Queen to prosecute and implead in the law all criminals and to doe all other things necessary or convenient as an atturney to suppress vice and immoralitie." [1]
>
> —1704 Connecticut Law

This hearing concerns one of the most urgent and difficult problems in the administration of criminal justice: how to secure to the accused his right to a fair trial after the State has disseminated prejudicial statements to the public by means of the press and other mass media of communications, and ultimately how to prevent public prosecutors from trying their cases outside of the courtroom.

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[1] This is the first law in any of the American colonies establishing the office of public prosecutor, and is quoted in National Commission on Law Observance and Enforcement, Report on Prosecution, April 22, 1931, No. 4, page 7 (Wickersham Report). At common law, crimes were prosecuted privately by the aggrieved complainant. Lord Hale urged the replacement of private prosecutors by public prosecutors in order to do away with the evil practices of private criminal prosecution (*ibid.*) p. 6.

For a modern view as to the duties of the prosecutor, see *Re Sawyer*, 360 U.S. 622, 666.

II

Published Statements of the District Attorney Arguing That the Death Penalty Should Be Imposed on Petitioner Represents the Deliberate Act of the State Calculated to Interfere with Orderly Procedure and Deprived the Petitioner of a Fair Penalty Trial.

A.

In California an accused who pleads guilty to murder in the first degree, a crime punishable by life imprisonment or death, is entitled to a jury trial on the sole issue of whether his punishment shall be life imprisonment or death [§§190, 190.1, California Penal Code]. The petitioner pleaded guilty to murder in the first degree. He was accorded a jury penalty trial and was sentenced to death.

The petitioner's right to a fair trial was invaded by the District Attorney's newspaper campaign. This Court has long recognized that due process may be denied where a trial takes place in a prejudiced atmosphere:

> "We, of course, agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the state, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the state deprives the accused of his life or liberty without due process of law" [*Frank* v. *Mangum*, 237 U.S. 309 at 335].

In *Moore* v. *Dempsey*, 261 U.S. 86, this Court in recognizing that an inflamed atmosphere might be incompatible with due process, after citing *Frank* with approval stated:

> "... But if the case is that the whole proceeding is a mask,—that counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion, and that the state courts failed to correct the wrong,—neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this court from securing to the petitioners their constitutional rights" [at 91].

Petitioner does not claim that his penalty trial was "mob-dominated" in the sense of *Frank* and *Moore;* however, he does urge that the extra-judicial conduct of the District Attorney was an intentional interference with petitioner's right to a fair trial and that no "corrective process", such as change of venue, was provided. The principle of the cited cases is that extra-judicial factors tending to compromise the inviolability of the courtroom may defeat due process, and this principle is not weakened because it is the state, rather than the mob, which inspires the interference.

The practice of trying cases in the mass media is, in a sense, more appalling than certain improprieties committed by the police. See, e.g., *Rochin* v. *California*, 342 U.S. 165. This because the police, ostensibly, have a valid objective, the discovery of evidence; it is the method of the police and not the objective which sometimes offends due process. No proper objective within the purview of a public prosecutor is remotely served by trying a case outside the courtroom. Moreover, the prosecutor is a

skilled lawyer and officer of the court who, therefore, has knowledge and duties patently incompatible with such conduct. A reversal in this case would effectively communicate this point to the public prosecutors.[5] Petitioner is not suggesting that this court discipline prosecutors for misconduct by reversing judgments of conviction. Rather, he suggests such treatment for its therapeutic value in this instance and its preventive effects in future cases.

B.

This court has spoken of standards of conduct applicable to prosecutors: "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring a just one." *Berger* v. *U.S.*, 295 U.S. 78, 88. These standards of conduct have become almost truistic.[6]

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[5] In reversing a conviction in *People* v. *Wilkes*, 44 Cal. 2d 679, the court stated:

"It was error for the prosecution to comment on the failure of Mrs. Wilkes to testify. (Citations.) Such error has repeatedly been denounced but held not to have been prejudicial in the circumstances of the particular cases in which it has occurred. Because of such repeated holdings it appears from the brief of the People, prosecuting officials have come to the belief that erroneous conduct in this regard is, as a matter of law, not cause for reversal. The conduct here, as in previous cases where it has been rebuked but held not prejudicial, was manifestly deliberate. *Regrettably, the circumstances make it apparent that we must recognize and deal with the fact that such conduct will not be discontinued as long as it is merely rebuked. . . .*" (Emphasis added.)

[6] "The prosecutor in a rural area should avoid appearing to be an overzealous crusader." (Frederick B. Bryant, "The Rural Prosecutor", in pamphlet, "Public Prosecutors", Practising Law Institute, 1955, p. 1.) "Because of the key position which the prosecutor holds in controlling the atmosphere of a criminal trial, he should abstain from overemphasizing the sordid aspects or criminal news. . . . The prosecutor who scrupulously practices law instead of attempting to play pol-

This court has dealt with inflammatory conduct on the part of newspapers and governmental officers. In *Shepherd* v. *Florida*, 341 U.S. 50, newspapers published as fact, and attributed the information to the sheriff, that the defendants had confessed. Justice Jackson, concurring, stated:

> " . . . If the prosecutor in the court room had told the jury that the accused had confessed but did not offer to prove the confession, the court would undoubtedly have declared a mistrial and cited that attorney for contempt" [pp. 51-52].

Likewise, in the case at bar, if the prosecutor had made his statements before the jury and prior to the normal time for argument, the trial court would have taken similar action. The difficulty with this type of case is that trial courts have become accustomed to trial by newspaper and have become inured to such "procedure".[7] Although our

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ities will not be tempted to shape up his case for newspaper headlines and for justice afterwards. . . . Before and during the trial of a case, the prosecutor should avoid making premature disclosures which may have a bearing on the sentiment of the public or the reasoning of the jurors." (Wendell Berge, "The Prosecutor and Crime Publicity", 29 A.B.A.J. 63 [1943].)

[7] Justice Frankfurter dissenting in *Stroble* v. *California*, 343 U.S. 181, observed:

> "And so I cannot agree to uphold a conviction which affirmatively treats newspaper participation instigated by the prosecutor as part of 'the traditional concept of the "American way of the conduct of a trial." ' Such passion as the newspapers stirred in this case can be explained (apart from mere commercial exploitation of revolting crime) only as want of confidence in the orderly course of justice. To allow such use of the press by the prosecution as the California court here left undisciplined, implies either that the ascertainment of guilt cannot be left to the established processes of law or impatience with those calmer aspects of the judicial process which may not satisfy the natural, primitive, popular revulsion against horrible crime but do vindicate the sober second thoughts of a community" (pp. 201, 202).

trial courts function in the twentieth century, their cognition of this problem is obsolete. The lower courts must realize that old process[*] is not necessarily due process, and just as ancient and crude methods of trial have had an historical refinement, so must the law extract and eliminate the impurity of trial by newspaper." Again, Justice Jackson recognized the point in *Shepherd*:

> " . . . But prejudicial influences outside the courtroom, becoming all too typical of a highly publicized trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated" (p. 51).

The prejudicial influence in petitioner's case was that the District Attorney carried on a brainwashing campaign to condition the local populace to his persuasion. The District Attorney propagandized on the main subject matter of this petitioner's *jury trial*. It is difficult to imagine statements which could more effectively infect a trial, the sole issue of which was to fix the defendant's penalty. Petitioner could not have had a fair penalty trial in Ventura County after the District Attorney's Madison Avenue packaging of the case.

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[*] Judge Walter W. Shaeffer recently wrote:

> "Due process cannot be confined to a particular set of existing procedures because due process speaks for the future as well as the present, and at any given time includes those procedures that are fair and feasible in the light of the then existing values and capabilities. Some features of present procedures are now accepted by force of custom, or because no practical way has been found to improve them. Technological change or a refinement in our sense of justice may make their retention intolerable" (70 Harv. Law Rev. 1 at p. 6).

C.

In *Stroble* v. *California*, 343 U.S. 181, this Court recognized that newspapers could so inflame and prejudice the atmosphere of a community as to deny due process. While *Stroble* affirmed the conviction under review, it is not dispositive of this case as is demonstrated by the comparison which follows.

In *Stroble* the acts of the District Attorney were less aggravated. Consequently this court merely deprecated his conduct in releasing to the press a confession which could have been printed four days later as a result of being read into the record at the preliminary hearing [343 U.S. at 193]. In this case the District Attorney carried out a deliberate press campaign to obtain the death penalty [see Appendices A and B].

Moreover, in *Stroble* this Court deemed it significant that the defendant did not seek a change of venue [343 U.S. at 194]. In *United States* v. *Handy*, 351 U.S. 454, this Court again considered it significant that the defendant in a capital case who raised the issue of trial in a prejudiced atmosphere had not sought to change the venue of that trial. In this case a motion for change of venue was seasonably filed and denied. The basis for the motion was that a fair and impartial trial could not be obtained in Ventura County because of the prejudicial atmosphere engendered by the published statements of the District Attorney.

And in *Stroble* it was noted that public passion had had an opportunity to subside between confession and trial [343 U.S. at 192-193]. Publicity concerning the Duncan murder reached its apogee only two weeks before the petitioner's trial commenced on April 6, 1959, for Mrs. Duncan's trial spanned the period between February 16, 1959

and March 20, 1959, and the accounts of her trial were front page copy in the local press, which extended its coverage by photographing the proceedings in derogation of Canon 35 of the Canons of Judicial Ethics. On March 21, 1959 the District Attorney was reported in the local press to have said that Mrs. Duncan's death verdict should head off moves to abolish the death penalty in California (R. 68, Exh. A-36, Moya).

The foregoing discussion highlights the two major distinctions between *Stroble* and this case. First, in petitioner's case the most harmful publicity resulted from the deliberate and intentional activities of the prosecution, while *Stroble* dealt primarily with newspaper accounts *per se*.[8a] The importance of this distinction is probably embedded in the difficult question of fair trial versus free press, because though *Stroble* was not a newspaper contempt case, a reversal might have served as an indirect restraining influence on the press. The thrust of the case at bar is directed primarily against the activities of the prosecutor as distinguished from the press.

The other important distinction is that petitioner vigorously sought a change of venue. In *Stroble* this court stated:

> " . . . But, in an effort to determine whether there was public hysteria or widespread community prejudice against petitioner at the time of his trial, we think it significant that two deputy public defenders who were vigorous in petitioner's defense throughout the trial, saw no occasion to seek a transfer of the

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[8a] " . . . [W]e are . . . faced . . . with the question whether newspaper accounts aroused such prejudice in the community that petitioner's trial was 'fatally infected' . . . " (*Stroble*, at p. 191.)

action to another county on the ground that prejudicial newspaper accounts had made it impossible for petitioner to obtain a fair trial in the Superior Court of Los Angeles County" [p. 194].

D.

Due process should not saddle the defendant with the difficult burden of proving prejudice. The opinion below requires petitioner to demonstrate he was prejudiced by the state's wrongful conduct, that is, the conduct of the District Attorney. The petitioner is required to show that a juror was influenced by the prejudicial statements. Note, the demand for the showing comes from the wrongful actor. The state acts in a way calculated to deprive the defendant of a fair hearing, and then places upon him the burden of proving injury. Of course, this proof requirement is consistent with basic notions of remedies underlying our law, i.e., a person seeking legal redress usually must prove that he has been damaged. The problem with transporting such a notion to this area is the difficulty of proof. Anyone who has observed a *voir dire* proceeding is struck by the crude, hit or miss, hunch method of getting rid of an unfavorable (i.e., "prejudiced") prospective juror. It is doubtful whether the use of professional psychometric personnel with their batteries of tests would provide any more certitude. Nevertheless, the state after engaging in acts presumably creating prejudice demands that the defendant, who is typically indigent, clearly demonstrate he has been prejudiced. Considering the difficulty of such proof the state has everything to gain, and little to lose, by selling its case in the mass media.

Accordingly, under this approach, the petitioner is required to produce a juror who has sufficient insight to recognize subconscious bias, or mistakenly believes he

is biased, or dishonestly says he is biased, or dishonestly conceals his bias,—an intolerable burden with which to saddle the aggrieved persons. That even judges may have difficulty in recognizing their own bias has been noted:

> " . . . No judge fit to be one is likely to be influenced consciously except by what he sees and hears in court and by what is judicially appropriate for his deliberations. However, judges are also human, and we know better than did our forebears how powerful is the pull of the unconscious and how treacherous the rational process. . . . " (Concurring opinion in *Pennekamp* v. *Florida*, 328 U.S. 331, 357.)

The harmful effect of trial by newspaper and other mass communication media has been the subject of scientific study, and there is little doubt that such communications can have a harmful effect on a trial.[9] Experiments show that statements attributable to a public figure are more readily acceptable and have more impact than statements from obscure persons.[10] Obviously, this finding is applicable to a District Attorney in his own county. Petitioner has prepared as Appendix C a survey of material dealing with this subject.

E.

Although petitioner stresses the effect of newspaper publicity on his right to a fair trial, this case does not involve a collision of fair trial and free press principles.

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[9] Murphy and Newcomb, *Experimental Social Psychology* (1937), pp. 961, 967 and 969; Cantrill and Allport, *Psychology of Radio*, pp. 177-180; Doob, *Public Opinion and Propaganda* (1945), p. 337. A comprehensive discussion of the entire problem of press and radio influence may be found in 63 Harv. L. Rev. 840. See, also, a recent note in 34 N.Y. Univ. L. Rev. 1278 (November 1959).

[10] Murphy and Newcomb, *op. cit. supra*, note 9, at 970.

However, the cases decided involving freedom of press and fair trial are, nevertheless, instructive. See, e.g., *Craig* v. *Harney*, 331 U.S. 367; *Pennekamp* v. *Florida*, 328 U.S. 331; *Bridges* v. *California*, 314 U.S. 252. These cases recognize that newspaper activity can affect the administration of justice.[11] The majority in *Bridges, supra*, although finding that the administration of justice had not been compromised, stated:

> "The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."

The English experience is also instructive.[12] An English writer has formulated the problem in the following manner:

> "Perhaps no feature of modern journalism has been so severely criticized as the attempt to try cases in the press before they have been heard in the courts. In their desire to furnish their readers with the latest startling news, newspapers, unless properly controlled by the law, may publish incorrect statements of fact or express biased opinions which will hinder a fair trial. This is particularly true in those cases . . . which are to be heard by a jury, for under modern conditions, every juryman reads a news-

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[11] Cf. *United States* v. *Powell*, USDC ND Cal., 171 F. Supp. 202.

[12] See appendix to *State of Maryland* v. *Baltimore Radio Show*, 338 U.S. 912.

paper, and it is not unlikely that he will be influenced by what it says. The English courts have, therefore, taken a strong view in an attempt, which has proven remarkably successful, to put down the evil."[13]

Lord Ellenborough in an early case observed:

> "If anything is more important than another in the administration of justice, it is that jurymen should come to the trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced. Is it possible they should do so, after having read for weeks and months before *ex parte* statements of the evidence against the accused, which the latter had no opportunity to disprove or to controvert" (*Rex* v. *Fisher*, 11 RR. 799 [K.B. 1811]).

In the light of modern psychology, Lord Ellenborough's ideal juror, having a mind "pure and unprejudiced", may be an illusory objective. Yet, granting the jury system, should not the courts bend every effort toward seeking this lofty ideal?

III

The Failure of the State to Supply a "Corrective Process" Constituted a Denial of Due Process.

After the District Attorney's statements, it was incumbent on the state to apply some "corrective process" (*Frank* v. *Mangum*, 237 U.S. 309). The accepted and available process was to change the venue of the trial. This Court in *Stroble* v. *California*, 343 U.S. 181, impliedly recognized that such procedure would be appropriate in cases of this nature.

---

[13] Goodhart Newspapers and Contempt of Court in English Law, 48 Harv. L. Rev. 885, at p. 885.

Since *Stroble,* several cases have arisen in the courts dealing with community prejudice. These cases suggest some kind of relief should be given to ameliorate the prejudice: either change of venue or an appropriate postponement of trial. In *Delaney* v. *United States,* 199 F. 2d 107 (C.A. 1, 1952), after indictment and before trial, a Senate Committee conducted hearings concerning conduct of the accused which received prominent attention in the press. The accused moved for a continuance of the trial to allow the prejudice to subside and his motion was denied. In reversing, a unanimous First Circuit, through Judge Magruder, stated:

> " . . . [T]he strongest point . . . relied upon by appellant, is that the trial judge committed error in not granting a continuance of the trial for a longer period, until such time as it could be estimated with greater assurance that the prejudicial effect of the aforesaid publicity . . . had so far worn off that the trial could proceed free of the enveloping hostile atmosphere and public preconception of guilt prevalent on January 3, 1952, when appellant was brought to trial" (p. 112).

The appellate court observed that the trial judge had conscientiously tried to minimize the prejudicial effect of the publicity by cautionary remarks and instructions, but discounts the prophylactic effect:

> " . . . But as stated by Mr. Justice Jackson, concurring, in *Krulewitch* v. *United States,* 1949, 336 U.S. 440, 453, 69 S. Ct. 716, 723, 93 L.Ed. 790: 'The naive assumption that prejudicial effects can be overcome by instructions to the jury, * * * all practicing lawyers know to be unmitigated fiction' . . . " (*ibid.*).

Here the petitioner's principal effort to mitigate the prejudicial atmosphere was to seek removal rather than

continuance, but the same fundamental question is involved.

In *Palakiko* v. *Harper*, 209 F. 2d 75 (C.A. 9), the court in affirming a conviction where defendant charged newspapers had created a prejudicial atmosphere, the court gave great weight to defendants' failure to ask for change of venue.

In *United States* v. *Rosenberg*, 200 F. 2d 666, 670 (C.A. 2), there was prejudicial newspaper publicity *during* the trial and defendants elected not to ask for a mistrial. Again, as in most of these cases, the court laid great stress on the fact that defendants failed to ask for some kind of relief from the prejudicial effect.

Recently a member of this court enunciated a view in accordance with the preceding analysis. See Douglas, *The Public Trial and the Free Press*, 46 A.B.A.J. 840, 841:

> "At other times the papers may so beat the drums of prejudice and passion as to make it doubtful whether a trial in the local courthouse can be fair to a particular defendant. See *Shepherd* v. *Florida*, 341 U.S. 50; *Stroble* v. *California*, 343 U.S. 181, 191-195. Local feelings may run so high as to necessitate a change in venue or a continuance to allow emotions to subside.
>
> "The point is that our remedy for excessive comment by the press is not the punishment of editors, but the granting of new trials, changes in venue, or continuances to parties who are prejudiced."

Conclusion

If this court reverses the death penalty judgment as petitioner requests, then the case will be returned to the California courts for a penalty hearing in a different county, the sole issue of which will be whether petitioner's penalty be fixed at life imprisonment or death.

It is respectfully submitted that the judgment below be reversed.

Respectfully submitted,

A. L. Wirin
John R. Danch
Richard L. Lissner
Gerald L. Rosen
Attorneys for Petitioner.

THE WEATHER
Considerable cloudiness today but gradually decreasing cloudiness late today and tonight. Sunny tomorrow.

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EIGHTY-FOURTH YEAR, No. 39 (32 PAGES TODAY) VENTURA, CALIFORNIA, MONDAY, DECEMBER 22, 1958 TWO SECTIONS ★ ★ SINGLE

OLGA'S BODY FOUND IN COUN NURSE WAS BEATEN, STRANG

D.A. Urges Death Term In Killings

DISTRICT Attorney Roy Gustafson today saw the Duncan murder as reason for continuation of California's death penalty. He issued the following statement:

"The brutal, calculated, revolting killing for hire of Olga Duncan is one of a number of horrible crimes which have recently been committed in California. I simply can not understand how some of our leaders, in the face of these events, can seriously contend that the death penalty is not appropriate pun-



Suspect Murder In Casit

By JOE PA

GRAND jury indictments Mrs. Elizabeth Duncan, 26, and Luis E. Moya, 19, i Duncan, 30-year-old Santa pectant mother whose batt terday on Casitas Pass.

District Attorney Roy present the case to the g indictments on charges of

The body was found yes low grave 20 feet off Casitas northwest of Coyote creek. Ba his part in the crime he said

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IN COUNTY; STRANGLED



Suspect Admits Murder for Hire In Casitas Pass

By JOE PAUL, JR.

GRAND jury indictments will be sought against Mrs. Elizabeth Duncan, 54, Augustine Baldonado, 26, and Luis E. Moya, 19, in the murder of Mrs. Olga Duncan, 30-year-old Santa Barbara nurse and expectant mother whose battered body was found yesterday on Casitas Pass.

District Attorney Roy A. Gustafson said he will present the case to the grand jury Friday, seeking indictments on charges of murder.

The body was found yesterday afternoon in a shallow grave 20 feet off Casitas pass highway about five miles northwest of Coyote creek. Baldonado, who has confessed to his part in the crime he said Mrs. Duncan hired him to do with Moya, led officers to the spot.

The woman had been pistol-whipped, beaten repeatedly with a wrench and strangled.

It was not immediately determined whether the pretty Canadian nurse was dead when she was buried. An autopsy was being performed this morning to determine the cause of death.

22

NURSE'S BODY FOUND NEAR CASITAS PASS

(Continued from Page 1)

and selecting a spot to dispose of the body.

Late on the night of Nov. 1., probably around midnight, they put their plan into operation. Moya was to go to the apartment of Olga Duncan while Baldonado stayed in the car. Moya was to tell her that his friend in the car needed help.

Baldonado told Higgins that he was lying down on the seat of the car when Moya came back to the car with the nurse. She was in a night robe.

As she leaned forward to look at Baldonado, he told the sheriff's investigator, Moya struck her over the head with the pistol butt.

Olga fought back, Baldonado said, and he tried to hold her while Moya continued to strike her with the gun. They pulled her into the car and kept hitting her until she was quiet, he said.

They drove out of Santa Barbara to Carpinteria, turned off on the Casitas pass road and continued into Ventura county.

Olga regained consciousness and began to struggle again as they carried her down an embankment to a spot near a highway drain culvert about 20 feet below the roadway. Baldonado said he strangled her while Moya began to scoop out a shallow hole in the soft silt at the edge of the drainage ditch with his hands.

Baldonado said he had trouble holding her and that Moya grabbed her and strangled her while he dug. "She got quiet and we figured she was dead," Baldonado said, "so we put her in the hole and covered her up."

The pair returned to Santa Barbara and after a couple of days Baldonado said he came to Ventura county.

KIDNAP SUSPECTS

They were arrested in Santa Barbara on suspicion of kidnaping after the elder Mrs. Duncan was placed in custody in connection with obtaining a fraudulent annulment in Ventura. Baldonado was released on that charge by Santa Barbara authorities, however, and re-arrested by Henderson and Osborne for Ventura county on a charge of failure to provide for his wife.

Baldonado maintained that Mrs. Duncan had never paid him any money she had promised.

After his confession, which he one before he finally got the right one. When the shallow grave was found, Baldonado became frightened and said he did not want to stay there while the body was being removed. He was granted permission to be taken to a Catholic priest.

ANNULMENT DISCOVERED

The matter came to the attention of authorities in Ventura county when the fake annulment affair was discovered. This occurred on Nov. 20, three days after Olga disappeared from her apartment.

She was arrested Dec. 13. Mrs. Duncan maintained she knew nothing of Olga's disappearance although she admitted obtaining the fake annulment papers Aug. 7. She came to Ventura at that time with Ralph Winterstein, 26-year-old ex-convict still at large, and Mrs. Emma Shortt, a friend.

A warrant has been issued for Winterstein charging him with forgery and perjury.

Mrs. Shortt, questioned by authorities, provided them with some key information in the case and at her request is being secreted away somewhere in Ventura county.

When Mrs. Duncan appeared in Ventura municipal court last week, she was represented by her son. He said he had talked to his mother and was convinced either "put up or shut up" as far as his mother was concerned when he made a successful bid to have the bail reduced from $50,000 to $5,000.

(Yesterday, Gustafson said: "He asked us to put up or shut up. Well, we put up.")

Duncan said he still loved his wife and hoped she would return to him.

During the weekend, it was announced in Los Angeles that Mrs. Duncan has changed attorneys, her son obtaining the services of S. Ward Sullivan, noted criminal lawyer.

In Santa Barbara city jail, Moya denied charges, police said. He buried his face in his hands and muttered, "I don't see why he (Baldonado) would say I had anything to do with it."

In Benito, Manitoba, Canada, Olga's mother, Mrs. Jessie Kupczyk, was reported to have collapsed from shock and a heart attack when she learned that her daughter had been slain.

Elias Kupczyk, 61, Olga's father, refused comment on the brutal slaying. He said he

Mrs. Burnham was a member of the Legion of Mary.

Requiem mass will be celebrated at 9 a.m. tomorrow at Santa Clara church. Burial will be in Santa Clara cemetery under the direction of Reardon Brothers mortuary.

Citizens Arrest Nabs Suspect

A Long Beach resident pursued and placed a citizens arrest on a hit and run suspect early Saturday after the suspect's auto struck his car at Main and Evergreen streets, Ventura police reported.

Arrested on suspicion of hit and run and drunk driving was Gunzalo Rodarte, Jr., 21, of 121 W. McFarlane street, Ventura.

Rodarte reportedly failed to stop after his auto struck a car driven by Earl Dean Stone, Long Beach. Stone pursued Rodarte and managed to stop the suspect's vehicle when it drove into a dead-end alley in the 500 block on E. Main street, police said.

Roy Gustafson Explains Why He'll Ask Death Penalty for Duncan Murder Trio

By MARVIN SOSNA

"WHEN you do catch 'em, and when you do convict 'em, what are you going to do with them . . . rehabilitate 'em?"

According to District Attorney Roy A. Gustafson, the chances of rehabilitating the three persons arraigned today on charges of murder-for-hire are "awfully slim . . . and I don't want to take that kind of chance."

That is one of the reasons why he is going to ask for the death penalty against Mrs. Elizabeth Duncan, and her two accused accomplices — Augustine Baldenado and Luis Moya—in the hired slaying of nurse Olga Duncan.

Gustafson repeated his plans yesterday, and added that he expected the case would probably be mentioned when the new legislative campaign opens this year to do away with the death penalty.

Such a campaign is likely, he believes. The proponents of abolition stand a better chance than they did last time, when a compromise plan—authored by Gustafson—averted an open fight on dropping capital punishment entirely.

Abolitionists would have stood a better chance this time, Gustafson believes, because—though he says their arguments are no stronger than they were before—the makeup of the legislature this year is different.

He believes most of the Democrats in the legislature favor abolition, and he heads the list of Sacramento abolitionists with Gov.-elect Edmund G. (Pat) Brown.

Brown, whom Gustafson supported in his campaign, "says he would do away with capital punishment if he could," says the D.A. "I disagreed with him on that and he knows it. His Republican opponent said he would not do away with it."

Probably the No. 1 foe of the death penalty in the legislature, says Gustafson is Sen. Fred Farr (D-Monterey.

But he believes that the Duncan case and the torture-slayings attributed to confessed killer Harvey Glatman in San Diego county will deter a number.

Gustafson agrees only partially. "Sure, it deters the defendant himself from ever doing it again. But it does not deter everybody, because we still have murders going on.

"The most pertinent point in the death penalty is retribution. Anyone who says we must get away from the 'barbaric thought' of retribution is not being realistic.

"We don't measure a man's penalty by his actions, but by what those actions did. If you're driving a car and you're drunk, that's a misdemeanor. But if you injure someone, that's a different set of consequences, and so you're a felon.

"If you shoot at someone with the intent to kill, that's assault with a deadly weapon, because you didn't aim well enough and the bullet missed him. If you shoot him and hit him with the bullet, that's murder.

"We deal in a punishment system with retribution. Society takes over for the individual who has been wronged, and it punishes the wrongdoer. Many crimes can't have retribution: rape, for instance. So we incarcerate, or fine or execute."

Retribution, he says, is one of four major points in any punishment. Another is deterrence, a third is rehabilitation. Rehabilitation's statistics are "pretty sad," he says. And any alternative to capital punishment usually involves life sentences without pardon or parole. A lifer without hope of ever leaving prison "has no hope and becomes a vegetable. Or worse, as we'll show you later."

But as far as rehabilitation goes, Moya was paroled a year ago after serving a year out of a 1-to-10-year term for marijuana possession. Gustafson says Moya was using marijuana when he was arrested in the Duncan murder case.

By the state's own figures, 48.8 percent of parolees wound up back in prison or jail within four years of being paroled. In the case of women, the rate was 57.5 percent. And the rate is going up, not down, he points out.

Still, he says, "It's a goal worth pursuing. But I think you have to be choosy about the people you're willing to take chances on."

Fourth on Gustafson's list of points in punishment is protection of society. And, he says, "You can say a life term protects society outside of prison. But what does it do inside? Even those wardens who favor doing away with the death penalty still want to have it for in-prison killings. These people could kill guards and each other, and know that they have already had the worst possible penalty. And remember, there is always the chance that some one could let him out, or he could escape, or the law could be changed to let him go free."

The death penalty, he says, "will not deter all crime, but it will certainly keep murder to a minimum. Look what it did to kidnaping."

The Lindbergh law is a prime example, Gustafson says, of society solving a criminal problem. Prior to it, kidnaping had been a fairly common crime.

In order to solve a crime problem, says the D. A., you must have "certainty of apprehension, certainty of conviction, and certainty of adequate punishment. The Lindberg law saw to all three."

In that light, why would anyone commit murder? "They think they won't get caught," he answers. "Lots of them aren't caught. Lots of them think that even if they're caught and convicted, they won't be executed." He noted that state-wide, only 57 percent of those who contest criminal court cases are convicted.

He commented that the possibility of putting California's third woman in the gas chamber does not present him with any qualms.

"This is appropriate punishment," he said, paraphrasing the judge in the Harvey Glatman case. And he adds: "What are you going to do, rehabilitate 'em?"

APPENDIX C

(1)

Howland and Weiss, "The Influence of Source Credibility on Communication Effectiveness", in *Public Opinion and Propaganda* (The Dryden Press, 1954)

"An important but little studied factor in the effectiveness of competition is the attitude of the audience toward this communication. Indirect data on this problem came from studies of 'prestige' in which subjects are asked to indicate their agreement or disagreement with statements which are attributed to different individuals. The extent of agreement is usually higher when the statements are attributed to 'high prestige' sources."

(2)

Charles W. Smith, Jr., *Public Opinion in a Democracy* (Prentice-Hall, Inc., 1939)

"Public opinion, then, is not the sum total of the individual opinions of isolated men. It is made up of the opinions of men living an associational life and affected by their contact with one another. Common interest, common elements of environment and inheritance, similar sources of information, and discussion among individuals give it unity of force" (p. 17).

(3)

Weld, A Study of the Way in Which a Verdict Is Reached by a Jury, 53 American Journal of Psychology 518 (1940)

"We also found as Weld and Roff found [in 51 American Journal of Psychology 609 (1938)] that early in the [moot court civil] trial many jurors reached a fairly definite decision, and that thereafter the effect of the testimony was merely to charge their certainty. This hap-

pened with at least 25% of the jurors, half of whom were disposed in the one, and half in the other way. Even those who as the trial progressed developed an attitude of doubt were still inclined to favor the one side or the other and in the jury room did so. We found no juror who attempted to maintain an attitude of doubt on the theory that he should make no decision until he had heard all the evidence, but we can substantiate the earlier findings of the cautious juror, and of the juror who is easily swayed by the testimony. In addition we discovered jurors who were influenced in reaching their verdict less by the proof than by their notion of what under the circumstances seemed to them to be 'right' or just" (p. 535).

(4)

Levine and Murphy, "The Learning and Forgetting of Controversial Material", 38 Journal of Abnormal & Social Psychology 507 (1943)

"An individual notes and remembers material which supports his social attitudes better than material which conflicts with these attitudes" (p. 515).

(5)

LeViness, Crime News, 66 U.S.L. Rev. 370 (1932) quotes H. L. Mencken

"Journalistic codes of ethics are all moonshine."

(6)

David Ensor, *I Was a Public Prosecutor*, Robert Hale Ltd. (1958)

"There is one other problem which has caused me some considerable concern for many years and that is prejudice against an accused person as a result of press publicity arising from the committal proceedings. It is a problem which is as old as the hills but has been brought to the attention of the Public by the remarks of Mr. Justice Devlin in a recent case at the Old Bailey. There have been a number of sensational cases in the last thirty years to

my knowledge when, because of publicity, it was very difficult to ensure that the accused received a fair trial. In cases where some juicy evidence is given before the Magistrates and plastered all over the daily Press and then later excluded at the trial because it is inadmissible, the danger is very real. The worst case of this on record is, I believe, the 'Blazing Car' case and the trial of Arthur Rouse. There before the committing Justices exciting evidence was given of the accused's relations with numerous young women, his harem, as he so aptly called it, and lurid details were given of his various illegitimate children. All given in evidence because the prosecution believed it necessary to prove a motive for Rouse's disappearance and his subsequent actions. It may or may not have been necessary but it was certainly food for the newspapers and the gaping public and, incidentally, the jury yet to be chosen. Then at the trial it is not used, no doubt because that great and eminently fair prosecutor, then Mr. Norman Birkett, regarded it as unfair. By that time, of course, the damage was done and it is difficult to imagine just how a trial could be properly conducted under such conditions. In the case of Rouse I do not for a moment believe that there was or could be any question of his guilt, but that is beside the point. Any prejudice to an accused person must be avoided at all costs. It is very true to say that not only should justice be done but that it should manifestly appear to be done" (pp. 169-170).

(7)

"The Newspaper and Crime", Address by Stanley Walker, City Editor, New York Herald-Tribune, Printed in Attorney General's Conference on Crime, December 10-13, 1934, Washington, D.C.

"In general, however, I am all in favor of the merciless, complete printing of all the news of crime. In no other way can the public be shaken out of its natural lethargy" (p. 6).

"I believe it is better for the public to be fully informed, whether the facts are pleasant or shocking, than to remain ignorant" (p. 7).

(8)

"Why Print Crime News", Address by Paul Bellamy, Editor, Cleveland Plain Dealer, Printed in Attorney General's Conference on Crime, December 10-13, 1934, Washington, D.C.

"Again, the newspaper which is honestly endeavoring to clean up crime in its community will meet with the criticism that it is whipping up a public hysteria which makes it impossible for defense lawyers to obtain jurors of an open mind, inasmuch as jurors, after all, are a part of the community. Anyone with considerable experience in the newspaper business can probably remember cases when something like this happened, and it should not happen. On the other hand, I am forced to observe in this connection, as I did in the matter of the moronic youths who imitate criminals, that if it is so, I do not see much that can be done about it. There should certainly be no deliberate attempt to build up unfair psychology toward any given criminal, but I would defend as long as I had any breath, the obligation of a newspaper to build up the strongest possible psychology that it can against crime. Lawyers, alas, do not always conduct the defense of criminals in such a way as to convince the unprejudiced observer that their principal object is the attainment of justice. If a layman dare make an observation with regard to the case I should like to suggest that the method of jury selection permitted, if not made obligatory, under the laws of most of our states, is a travesty and a joke. Repeatedly I have seen lawyers proceed toward the selection of a jury with no other purpose in mind, so far as an outsider can determine, except to get just as dumb a jury as possible and a jury which can have the wool pulled over its eyes as easily as possible by rhetoric and passionate declamation. It has always seemed to me a particularly foolish thing to allow lawyers to eliminate from juries all persons who will admit that they have read any newspaper record concerning an important or sensational crime. At risk of being accused of making a sales talk for newspapers, I should like simply to observe that most people in this day and generation do read newspapers, and

those who do not read newspapers are for the most part more nearly analogous to the vegetable than to the animal kingdom. They are people who do not know what is going on, who have no opinion, no imagination, very little education, and for the most part are utterly incapable of analyzing any proposition requiring thought" (pp. 14-15).

(9)

Wendell Berge, "The Prosecutor and Crime Publicity", 29 A.B.A.J. 63 (1943)

"The prosecutor is not merely an advocate—he appears in Court 'clothed in official raiment' " (p. 64).

(10)

Statement of Judge of the Criminal Court of Baltimore City, Quoted in *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912

" . . . [B]ut Judges are supposed to be made of sterner stuff than to be influenced by irresponsible statements regarding pending cases. They are trained to put aside inadmissible evidence and while we, of course, recognize our limitations, I think that most Judges, at least, are fairly able to disregard improper influences which may have reached their attention.

"Now, what about the jury? In the first place, what is this jury that we are talking about? They are twelve men, or in most jurisdictions now, as in Maryland, men and women who are picked from all walks of life and who have the responsibility of hearing cases and determining, in this State at least, not only the facts but the law in the case. It may be unfortunate, perhaps, but certainly the fact is that the jury's verdict is final in most cases. There is the limited protection of the accused to apply for a new trial, but the Court of Appeals can not determine—review and determine—the propriety of the verdict reached by the jury either on the law or on the facts. Now this jury system is intended, and I think it works out that way, to bring to the trial of a case as one element, the public opinion in the community. It is true that the jury is sworn

to decide the case upon the evidence which it hears from the witness stand, but I think that no experienced lawyer would contend that a jury is not expected to bring to the consideration of its verdict the temperament of the community in which the members of the jury live. The jury is called upon to decide the facts as it hears them from the witness stand in the light of its past experience and, if you please, its past knowledge. True, attempts are made to get jurors who have not been touched with any previous influence in the case, but the safeguards that are provided for the realization of that ideal are all too limited" (pp. 913-914).

"Now, the Court can not help but feel that the broadcast referred to in these cases must have had an indelible effect upon the public mind and that that effect was one that was bound to follow the members of the panel into the jury room . . . " (p. 915).

"The suggestion was made here also, that the mischief could have been avoided by exercising the right of the Defense to examine, on their voir dire, all prospective jurors and then inquiring as to whether or not they had heard these broadcasts. Well, now, it hardly seems necessary for the Court to say to men who are experienced in the trial of jury cases, that every time Defense Counsel asked a prospective juror whether they had heard a radio broadcast to the effect that his client has confessed to this crime or that he has been guilty of similar crimes, he would by that act be driving just one more nail into James' coffin. We think, therefore, that remedy was useless" (p. 916).

(11)

Canon of Professional Ethics No. 20, American Bar Association

NEWSPAPER DISCUSSION OF PENDING LITIGATION

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of Justice. Generally they are to be condemned. If the

horrible crimes which have recently been committed in California. I simply can not understand how some of our leaders, in the face of these events, can seriously contend that the death penalty is not appropriate punishment for the perpetrators of such a crime.

"Many persons contend that the death penalty does not deter murder. Frankly, I am sick of this illogical argument. Of course penalties do not completely deter crimes. Jail sentences do not completely deter drunken drivers, burglars, robbers or any other criminals and death penalties do not completely deter murderers. But that is no reason to dispense with penalties.

"Retaliation is a basic instinct of the human race. In civilized societies, the government takes over from the individual the job of retaliating against a wrongdoer. From biblical times, a life for a life has been recognized as just and fair.

"The alternative in California, a life sentence which permits a prisoner to be paroled in seven years, simply is insufficient retaliation. I hope the people of this state rise up against the propaganda drive that has flooded us lately about the so-called evils of capital punishment. They must demand that California retain the death penalty to deal with situations such as the Duncan case."



SHALLOW, HAND-SCOOPED GRAVE — Sheriff's Detective Ray Higgins stands beside shallow Casitas pass grave that held body of pretty Canadian nurse Olga Duncan and her unborn child. Dotted line indicates grave. (Star-Free Press photo by Cliff Mallair, Jr.)



OLGA DUNCAN
Struggled for Life



MRS. ELIZABETH DUNCAN
Smiles When Told Body Found



District Attorney Roy A. Gustafson said he will present the case to the grand jury Friday, seeking indictments on charges of murder.

The body was found yesterday afternoon in a shallow grave 20 feet off Casitas pass highway about five miles northwest of Coyote creek. Baldonado, who has confessed to his part in the crime he said Mrs. Duncan hired him to do with Moya, led officers to the spot.

The woman had been pistol-whipped, beaten repeatedly with a wrench and strangled.

It was not immediately determined whether the pretty Canadian nurse was dead when she was buried. An autopsy was being performed this morning to determine the cause of death.

It was learned that she was lured to her death when she thought she was needed to help a man who was injured or ill. Moya is reported to have tricked her into thinking that "his friend in the car" needed help. Although seven months pregnant and said by her doctor to be in a state of near-shock from fear and worry, she put on a robe to see if she could give aid.

Officers said that when Mrs. Duncan was told of the discovery of her daughter-in-law's body, the older woman smiled faintly but made no comment.

She was quoted later as saying she could not understand why anyone would confess to such a brutal slaying and attempt to link her with it.

It was just over one month ago that she disappeared from her apartment. Last to see her alive were Miss Sylvia Butler and Miss Doreen Corraini, Cottage hospital nurses in Santa Barbara, who visited at her apartment until 11:30 p.m. Nov. 17.

Since that time, the bizarre story has developed of a strange attraction of mother for son. Gustafson said he believes that motive for the hired killing was jealousy. The elder Mrs. Duncan flew into a rage when Frank Patrick Duncan, attorney with a prominent Santa Barbara law firm, married Olga.

Olga was the nurse on duty when Mrs. Duncan was treated at the hospital for an overdose of sleeping pills. She and Frank met at that time and a whirlwind romance ensued. She reportedly told Frank later that she was to have a baby and on June 20 they were married.

In letters to parents and relatives, Olga revealed that on her wedding night Mrs. Duncan threatened her life. For the next several months, information from Olga's letters and her reports to her physician indicated she lived a nightmare.

Mrs. Duncan harrassed her continuously, the girl reported to friends and relatives. She put notices in the newspaper saying Frank Duncan would not be responsible for his wife's debts and several times told Olga she should get out of town and leave her son alone.

Gustafson said he has evidence to indicate that Mrs. Duncan had previously tried to hire the killing of her son's wife. He would not elaborate, but said, "This is not the first time Mrs. Duncan tried to have her (Olga) killed."

Baldonado told officers that when Mrs. Duncan was making arrangements for them to "do away" with Olga she said she had "some acid and some pills if we needed them."

Gustafson said that this unusual case will be his first opportunity to try a murder case under the three-phase law he authored. The case, he said, provided he obtains a grand jury indictment of the trio, will be tried in three steps. First, the suspects will be tried to determine guilt, then to determine penalty and finally to determine sanity.

DEC 2



to Ventura county.

KIDNAP SUSPECTS

They were arrested in Santa Barbara on suspicion of kidnaping after the elder Mrs. Duncan was placed in custody in connection with obtaining a fraudulent annulment in Ventura. Baldonado was released on that charge by Santa Barbara authorities, however, and re-arrested, by Henderson and Osborne for Ventura county on a charge of failure to provide for his wife.

Baldonado maintained that Mrs. Duncan had never paid him any money she had promised.

After his confession, which he wrote out and signed in Ventura county jail, Baldonado made a map for officers to use in locating the grave. His map was not accurate, however, and after an initial search of the area failed to locate the body, Baldonado agreed to lead them to the spot.

He had officers stop twice at locations he thought to be the

ted obtaining the fake annulment papers Aug. 7. She came to Ventura at that time with Ralph Winterstein, 26-year-old ex-convict still at large, and Mrs. Emma Shortt, a friend.

A warrant has been issued for Winterstein charging him with forgery and perjury.

Mrs. Shortt, questioned by authorities, provided them with some key information in the case and at her request is being secreted away somewhere in Ventura county.

When Mrs. Duncan appeared in Ventura municipal court last week, she was represented by her son. He said he had talked to his mother and was convinced she was not lying when she said she knew nothing of Olga's disappearance.

He said authorities should

Mrs. Duncan has changed attorneys, her son obtaining the services of S Ward Sullivan, noted criminal lawyer.

In Santa Barbara city jail, Moya denied charges, police said. He buried his face in his hands and muttered, "I don't see why he (Baldonado) would say I had anything to do with it."

In Benito, Manitoba, Canada, Olga's mother, Mrs. Jessie Kupczyk, was reported to have collapsed from shock and a heart attack when she learned that her daughter had been slain.

Elias Kupczyk, 61, Olga's father, refused comment on the brutal slaying. He said he planned to leave shortly to arrange burial for his daughter.

Duncan was unavailable for comment.

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lic opinion, crosses the rational course of justice and administration just as strongly, and under certain conditions far more so, as the 'star chamber' proceedings of an 'absolute' ruler has been able to do. In this connection, that is, under the conditions of mass democracy, public opinion is communal conduct born of irrational 'sentiments.' Normally it is staged or directed by party leaders and the press" (p. 221).

(20)

Harold Laski, *The American Democracy* (The Viking Press, Publishers, 1948)

"In no country in the world today has the lawyer a standing remotely comparable with his place in American politics" (p. 110).

(21)

Gunnar Myrdal, *An American Dilemma* (Harper Brothers, Publishers, 1944)

"The jury, for the most part, is more guilty of obvious partiality than the judge and the public prosecutor" (p. 552, discussing justice for Negroes in southern courts).

Brown, whom Gustafson supported in his campaign, "said he would do away with capital punishment if he could," says the D.A. "I disagreed with him on that and he knows it. His Republican opponent said he would not do away with it."

Probably the No. 1 foe of the death penalty in the legislature, says Gustafson is Sen. Fred Farr (D-Monterey).

But he believes that the [illegible] case and the torture-murder slayings attributed to confessed killer Harvey Glatman in San Diego county will deter a number of legislators from voting for abolition during the coming legislative session.

The use of the word "deter" brings up the major argument voiced in some quarters on the use of capital punishment. Those proponents have said that the penalty of death is a [illegible] "deterrent" to those who might commit murder.

extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

(12)

People v. *Ford,* 25 Cal. App. 388

" . . . Ordinarily where there is an existing highly inflamed condition of the public mind prejudicial to a person charged with crime, it finds some manifestation through the public press, or by assemblages of the people in the neighborhood of the scene of the crime, and, if general, in other parts of the county. . . . "

(13)

Bernard Botein, *The Prosecutor* (Pocket Books, Inc., Publishers, 1957)

"This is my recurring premise, conjugated in case histories—that a ruthless, resourceful prosecutor, indifferent to the rights of defendants, can with little risk win headlines or fame. Such a small group of lawless law-enforcement officers, dangerous out of all proportion to their number, can evolve only because most of us are entirely unaware of the anatomy of a prosecuting agency. We form strange, romantic notions of a district attorney's job, shaped by fictional and Sunday supplement stories.

"When reading unabashed fiction we exult in the skill with which Perry Mason or Ephraim Tutt put the overweening and ruthless prosecutor to rout. Through many pages, before we reach the courtroom finale, the author has taken pains to win our sympathy for the morally, if not legally, innocent defendant; and to excite our detestation for the loathsome district attorney, who would offer the defendant as a human sacrifice on the altar of his ambition and vanity. We find ourselves ranged on the side of virtue, which is a good enough fictional equivalent for law and order.

"But in real life this same concern for law and order sometimes causes us unwittingly to admire and vote for the very type of prosecutor we loathe in fiction—provided he puts on a resounding show in lashing the hapless suspect. Everybody is for curbing crime, and as vigorously as possible. Unfortunately, the public has no means of distinguishing official vigor from official excesses. It is safer politically for a prosecutor to ride roughshod over the rights of an accused, provided he does so with energy and fanfare, than to proceed cautiously with scrupulous regard for those rights. The latter course might be misconstrued as coddling criminals or official laxity. As the late Justice Jackson wrote, 'District attorneys who have been rebuked by the courts are frequently promoted by the public.'

"In real life there is no helpful author to convince us of the innocence of the defendant. The mere accusation by vested authority so debases the accused in the public mind as to muffle his protestations of innocence; and also taints anyone who questions the prosecutor's methods. Prosecution becomes largely an *ex parte* business. The major vice of some few prosecutors—abuse of human rights and privileges—becomes a major virtue in the eyes of the public.

"I do not recall any prosecutor ever coming a cropper because of the harshness of the methods he employed—provided he did not invite scrutiny by some collateral political blunder. This holds true as well in related fields of public service. If a United States senator advocates high taxes he will be criticized by colleagues, newspapers and persons opposed to such a program. However, let him investigate fraud in the processing of those tax returns, and he can do no wrong.

"The remedy, as I see it, is not to strip prosecutors of any of their powers. As balanced by a proper regard for the protection afforded the individual by the Bill of Rights and related legislation, a prosecutor needs these powers to do an effective job. But I believe abuse of these necessary powers can be discouraged through a critical public made aware of prosecuting methods. And I also believe that a tendency by the decent members of a prosecuting

staff to shrug off the improper conduct of a few associates as a matter of their personal privilege will diminish as they are jolted into realization of the consequences" (pp. 243-245).

(14)

Statement of John Lord O'Brian Concerning Prosecutions Under the Espionage Act of 1917, Quoted in Zechariah Chafee, Jr., *Free Speech in the United States* (Harvard University Press, Publishers, 1948)

"It has been quite unnecessary to urge upon the United States Attorneys the importance of prosecuting vigorously, and there has been little difficulty in securing convictions from juries. On the contrary, it has been necessary at all times to exercise caution in order to secure to defendants accused of disloyalty the safeguard of fair and impartial trials. In addition to the causes already recited there were the patriotic agitations continually being carried on by the Liberty Loan speakers, four-minute men and others, all of which worked the whole country up to a pitch of intense patriotism, resulting in instinctive aversion toward anyone even under suspicion for disloyalty" (p. 67).

Also Chafee:

"For the human machinery broke down at a second point—the jury. It is sometimes suggested that a jury trial gives a sufficient protection for freedom of speech, and that public sentiment will inevitably reflect itself in verdicts of acquittal if the prosecution seems unjust. It is undoubtedly true that in England freedom of discussion is, as Dicey says, 'little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written.' In my first chapter, however, I have endeavored to show that this protection is entirely inadequate and that the constitutional provision must mean much more. It is only in times of popular panic and indignation that freedom of speech becomes important as an institution, and it is pre-

cisely in those times that the protection of the jury proves illusory. As the Assistant to the Attorney General admits, 'There has been little difficulty in securing convictions from juries'" (p. 70).

(15)

Joseph Ratner (Ed.), *The Philosophy of Spinoza* (The Modern Library, Publishers, 1927)

"If we imagine men to love or hate a thing, we shall therefore love or hate it; that is to say, we shall therefore rejoice or be sad at the presence of the thing, and therefore we shall endeavor to do everything which we imagine men will look upon with joy, and, on the contrary, we shall be averse to doing anything to which we imagine men are averse.

"He who imagines that he affects others with joy or sorrow will necessarily be affected with joy or sorrow. But since man is conscious of himself by means of the emotions by which he is determined to act; therefore if a person has done anything which he imagines will affect others with joy, he also will be affected with joy, accompanied with an idea of himself as its cause; that is to say, he will look upon himself with joy. If, on the other hand, he has done anything which he imagines will affect others with sorrow, he will look upon himself with sorrow" (pp. 241-242).

(16)

R. M. MacIver, *The Web of Government* (The Macmillan Company, Publishers, 1948)

". . . All institutions, whether dignified by ceremony or not, tend to implant in men a sense of the authority that maintains them. Since the state is the guardian and maintainer, at least in a formal sense, of all social institutions the might of its authority is omnipresent. Whatever men do, whatever they strive for, predicates under normal conditions the existing frame of institutions. Our dependence on institutions becomes identified with our dependence on authority, and the value we attach to in-

stitutions is reflected in our respect for authority" (p. 46).

"Power is multi-form. By social power we mean the capacity to control the behavior of others either directly by fiat or indirectly by the manipulation of available means. Property and status are thus sources of power. But there are various other sources. The office a man holds gives him a certain amount of power, apart from the status attaching to it or the particular prestige of the office-holder. This is the power of bureaucracy. Akin to it is the power of any specialist, who can take advantage of his function or technique to control to his liking the actions of other men. There is also the ampler power accruing to the headship of any organization, varying with the kind of organization and its extent . . ." (p. 87).

"The agencies of publicity take higher rank in the power structure. Here we reach a source of power peculiarly modern, the control, through ownership or otherwise, of those media of communication that transmit news or promulgate opinion. We include here the motion picture industry, since it purveys news and since the films it produces inevitably are impregnated with some kind of doctrine or at least with some philosophy of life. We include the radio, though, owing to the technical conditions of broadcasting, governmental regulation and other considerations restrict tendencies to make this medium the organ of the particular doctrines or policies of the companies which own it—where the radio system is not state-administered. Where democratic conditions prevail state administration is itself subject to similar restrictions. It is otherwise with the business of publishing, especially the publishing of newspapers and periodicals. Since news-gathering is a vast and costly enterprise and since the economics of newspaper publishing limits the number of major newspapers in any area to a very small group, the power of the press is concentrated in the hands of a few men. This power of the press is increased through the development of newspaper chains under one ownership, through the syndication of articles and features, and through the hook-up of newspapers with radio stations. The newspaper has another kind of power, in that it determines

the degree of publicity to be assigned to the doings of persons and organizations, apart from the publicity of paid advertising. The importance of this power depends on the fact that publicity in modern society is not only a factor of prestige but also, for certain occupational categories and for many kinds of organization, a primary condition of success in their respective pursuits" (pp. 89-90).

(17)

Thomas Hobbes, *Leviathan* (Basil Blackwell, Oxford, Publisher)

"And as the power, so also the honour of the sovereign, ought to be greater, than that of any, or all the subjects. For in the sovereignty is the fountain of honour. The dignities of lord, earl, duke, and prince are his creatures. As in the presence of the master, the servants are equal, and without any honour at all; so are the subjects, in the presence of the sovereign. And though they shine some more, some less, when they are out of his sight; yet in his presence, they shine no more than the stars in the presence of the sun" (p. 120).

(18)

Robert E. Cushman, *Civil Liberties in the United States* (Cornell University Press, Publishers, 1956)

"Community hysteria whipped up by 'yellow' press and radio stories of crimes may well make it impossible in many instances to empanel a jury which can keep out of its mind the prejudice and antagonisms thus aroused" (p. 152).

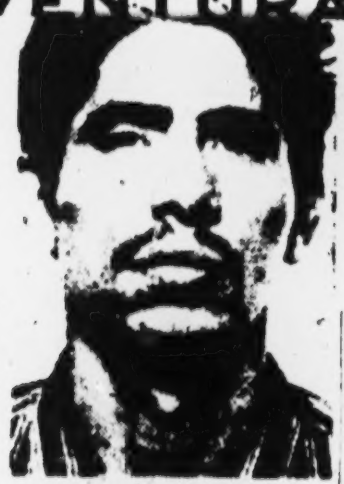
(19)

Gerth and Mills (Tr.), *From Max Weber: Essays in Sociology* (Oxford University Press, Publishers, 1946)

". . . Every sort of 'popular justice'—which usually does not ask for reasons and norms—as well as every sort of intensive influence on the administration by so-called pub-

VENTURA COUNTY

10 CENTS A COPY



AUGUSTINE BALDONADO
Leads Way to Grave



MRS. ELIZABETH DUNCAN
Smiles When Told Body Found

Mrs, Duncan's Lawyer Plans To Enter Plea of 'Not Guilty'

Los Angeles attorney S Ward Sullivan, veteran criminal lawyer, said today he will enter a plea of "Not guilty" for Mrs Elizabeth Duncan, 54-year-old Santa Barbara woman expected soon to be charged with murder

Sullivan, obtained to represent Mrs Duncan by the woman's son, Frank Patrick Duncan spent more than an hour with his client in the women's portion of Ventura county jail today

"She denies having any part of the killing of Olga Duncan," Sullivan said.

He said she admitted having met both Augustine Baldonado and Luis Moya who are believed to have committed the actual killing Baldonado has confessed to the killing and said he and Moya were hired by Mrs Duncan to do the job.

Sullivan said that "she feels someone else is trying to involve me in the murder," but he would not say whether she told him who that might be

Asked what the feelings was between the two women, the son's wife and the mother in law, Sullivan said that 'here was no indication of hatred on the part of Mrs Duncan "She has told me, however, that there was no love lost between them"

After talking to her in the jail, Sullivan went down town to purchase some clothes for his client, explaining that she had not had an opportunity to bring other clothes with her from Santa Barbara

"This is a very complex matter," Sullivan said "There are many ramifications" He estimated that once the matter comes into court it may take as long as a month to try the case.

BULLETINS

An autopsy, today revealed that Mrs. Olga Duncan died as a result of asphyxiation, Coroner Virgil L. Payton said. He said it is impossible to determine whether death resulted from strangulation or from suffocation after being buried. The woman sustained numerous lacerations about the head, but no skull fracture. Payton said this ruled out the possibility that she was bludgeoned to death and made it a possibility that she was buried alive.

WASHINGTON — (UPI) — President Eisenhower announced today that he will submit to congress a balanced budget for the new fiscal year with revenues and spending "in the general area" of 77 billion dollars.

STARGAZER SAW:

DIANNE STEELE avoiding the mistletoe

can had previously tried to hire the killing of her son's wife. He would not elaborate, but said, "This is not the first time Mrs Duncan tried to have her (Olga) killed."

Baldonado told officers that when Mrs Duncan was making arrangements for them to "do away" with Olga she said she had some acid and some pills if we needed them."

Gustafson said that this unusual case will be his first opportunity to try a murder case under the three-phase law he authored The case, he said, provided he obtains a grand jury indictment of the trio, will be tried in three steps First, the suspects will be tried to determine guilt, then to determine penalty and finally to determine sanity.

There is the possibility that since Olga was carrying a child of more than five months that authorities will consider the case a double homicide

Gustafson talked to Mrs Duncan last night in the county jail No disclosures were made as to the content of the discussion

He said today that the case has been developed as the result of outstanding police work on the part of investigators in his office and the sheriff's department Clarence Henderson directed the district attorney's investigation.

The break in the case came yesterday morning when Ray Higgins, investigator for the Ventura county sheriff's office, resumed questioning of Baldonado. Higgins had questioned the suspect in previous cases of a less important nature and felt he could eventually get through to him.

"We were discussing the case and his involvement," Higgins said "when he jumped up and said, 'I'll do it for my kids,' and started talking" (Baldonado's wife, from whom he is separated, gave birth to twins Nov. 23.)

Higgins called in his boss, Lt. William Woodard of the sheriff's detective bureau, and Clarence Henderson and Tommy Osborne, investigators for the district attorney.

This is the story Baldonado told:

With Moya, Baldonado said he was approached by Mrs. Duncan early in November, he can't remember the exact date, and offered $6,000 to "get rid of" the 30-year-old nurse, wife of Frank Duncan, and an expectant mother.

Higgins reported that Baldonado talked freely once he got started. He told of renting a car from Sarah Contreras for $25 and borrowing a .22 pistol from Chico Rojo, Santa Barbara friends. For a couple of days the suspect said, he and Moya rode around in the car making plans

(See NURSE'S, Page 2)